IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

**O R D E R.**

(1) D. B. CIVIL WRIT PETITION NO.6904/2005
(Shree Nath Marbles v. Union of India & Others)

(2) D. B. OTHER TAX REF. PETITION © NO.09/2005
(Shree Nath Marbles v. Union of India & Others)

DATE OF ORDER :::: 22-10-2007

**PRESENT**

**HON'BLE MR. JUSTICE N. P. GUPTA**

**HON'BLE MR. JUSTICE MUNISHWAR NATH BHANDARI**

Mr. R. S. Mankad, for Petitioner (s)
Mr. V. K. Mathur for Respondent (s)

**BY THE COURT: (PER HON'BLE MR. BHANDARI, J.):-**

Petitioner has preferred reference petition as well as writ petition pertaining to one and the same issue, thus both the cases were heard and decided by this common judgment.

In reference petition, moved under Section 35 H (1) of the

Central Excise Act, 1944 (hereinafter referred to as 'the Act of 1944'), petitioner has prayed for framing following substantial question of law for decision :-

> "Whether cutting of marbles block into slabs is not amounting to manufacture in terms of Section 2 (f) of Central Excise Act, 1944 and thus levy of excise duty and penalty from the petitioner is illegal and without jurisdiction."

For the purpose of above question, it has been contended that the Central Excise Officer of Udaipur Division visited factory premises of the petitioner on 20.02.200 and checked the stock of marble slabs lying in the factory. There, on physical verification, it was found that 4549.18 sq. meter of irregular slabs and 3218.81 sq. meter of regular slabs of marble were found short against recorded balance of 17213.48 sq. meters and 5982.61 sq. meters of irregular and regular marble slabs respectively. After service of the show-cause notice by the Joint Commissioner, Central Excise, imposed duty to the tune of Rs.2,33,039/- and equivalent amount of penalty was imposed under Section 11 A C, apart from penalty of Rs.25,000/- under Rule 173 Q of the Central Excise Rules, 1944 (for short, 'the Rules of 1944'). The petitioner had challenged the said order in

appeal before the Commissioner (Appeals), wherein the order passed by the original authority was upheld, except the imposition of penalty of Rs.25,000/- imposed under Rule 173 Q of the Rules of 1944. The said penalty was set aside by the Commissioner (Appeals).

The petitioner, thereafter, approached Customs Excise and Gold Control Appellate Tribunal, wherein the Tribunal reduced the amount of penalty by imposing an amount of Rs.1,00,000/- and accordingly, the order passed by the Commissioner (Appeals) was affirmed with modification with regard to the imposition of penalty under Section 11 A C of the Act of 1944. The petitioner aggrieved by the order passed by the Tribunal thus, preferred firstly, a reference application by invoking the provisions of Section 35 H (1) of the Act of 1944, mainly on the ground that in the case of Aman Marbles Industries Pvt. Ltd. v. C.C.E.,Jaipur [ 2003 (157) E.L.T. 393 (SC) ] Hon'ble Apex Court has laid down that cutting of Blocks into marble slabs does not amount to manufacturing in terms of Section 2 (F) of the Central Excise Act of 1944. Therefore, according to the reference petitioner, the order passed by the Tribunal is not sustainable and the reference should be called and decided in favour of the petitioner on the substantial question of law formulated in the petition.

Per Contra, learned counsel appearing for the Union of India, urged that the substantial question of law formulated by the petitioner is not attracted on the facts of the case. It was contended that the issue involved in the present matter is quite different than decided by the Hon'ble Apex Court. Narrating the facts of this case, it was submitted that in para 4 of the impugned judgment of the Tribunal, consultant for the appellant had not disputed the shortage of finished goods found in the factory premises of the petitioner at the time of verification of the stock by the Central Excise Officer, rather Shri Abhinandan Kanthalia, in his statement, deposed that he was fully satisfied with the physical stock verification conducted by the Central Excise Officer and admitted the shortage. Thus, in these facts and circumstances, the issue decided by the Tribunal, was pertaining to shortage of irregular and regular marble slabs and not on the issue on which substantial question of law has been framed. The learned counsel for the Union of India further urged that even before the Tribunal, the petitioner has taken different plea than what has been raised in the present reference petition. Referring to the judgment of the Tribunal, it was shown that before the Tribunal, the petitioner has raised the issue to the effect that the petitioner has started production in their unit long back, thus there is only apparent shortage in the stock of finished goods due to wear and tear of marble being a fragile

commodity. The learned Tribunal has considered this aspect of the matter and decided the same in view of the fact that the petitioner failed to substantiate their contention that the shortage in the finished goods had arisen due to storage of marble for a long period, more specifically due to the wear and tear of the product. Therefore, in absence any material to substantiate the argument, the Tribunal has dismissed the appeal preferred by the petitioner. It was thus, prayed that the reference petition preferred by the petitioner involves no substantial question of law, thus deserves to be dismissed.

We have considered the rival submissions of the learned counsel for the parties and carefully examined the matter to find out as to whether any substantial question of law is involved in the present matter so as to call for reference and decide the legal issue.

The only argument raised by the learned counsel for the petitioner is that the present matter is covered by the judgment of the Apex Court in the case of Aman Marbles Industries Pvt. Ltd. v. C.C.E., Jaipur. In view of the fact that due to handling of the marble slabs, there were wears and tears, resulting in crazy, thus shortage arose for that reason, but this aspect was not taking into consideration by the Tribunal while imposing the

excise duty as well as the amount of penalty.

The facts narrated above were, in fact, considered by the Tribunal and taking note of the fact that the petitioner failed to substantiate the facts and grounds raised in the appeal, thus the plea raised by the petitioner, was not accepted. While arguing the present petition, learned counsel for the petitioner has changed his ground while referring to the judgment of the Hon'ble Apex Court in the case of Aman Marbles Industries Pvt. Ltd. v. C.C.E., Jaipur, without taking note of the fact that judgment of the Hon'ble Apex Court has no application in the present case, inasmuch as, the issue involved in the present matter is not that if the marble blocks are cut into slabs, then it amounts to manufacturing or not, but in regard to the shortage of irregular and regular marble slabs, more so, when the shortage was admitted by the petitioner, even while deposing his statement. Thus, the issue involved in the present matter is not pertaining to cutting of blocks into slabs, hence not only the judgment of the Apex Court does not apply to the facts of the case, even the substantial question of law framed in the reference petition does not arise in the facts of the case. Hence, we are of the opinion that no substantial question of law exists in the present matter. Therefore, the reference petition deserves to be dismissed and the same is hereby dismissed.

Coming to the writ petition, the learned counsel for the petitioner has submitted again that in view of the judgment of the Apex Court in the case of Aman Marble Industries Pvt. Ltd. v. C.C.E., Jaipur, the petitioner was entitled for refund of amount paid pursuant to the judgment of the Tribunal under challenge. Since we have already expressed our view that the judgment in the case of Aman Marble Industries Pvt. Ltd. V. C.C.E., Jaipur has no application in the present matter, thus even the writ petition filed on the same issue and in regard to the same order, cannot be accepted, rather same is not even maintainable. Thus, writ petition is also dismissed. Cost made easy.

**(MUNISHWAR NATH BHANDARI),J.** **(N. P. GUPTA),J.**

scd